U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

DATE: APR 14 2011 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]

PETITION: Petition by Entrepreneur to Remove Conditions Pursuant to Section 216A of the Immigration and Nationality Act, 8 U.S.C. § 1186(b)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition to remove conditions. The matter is now before the Administrative Appeals Office (AAO) on certification pursuant to the regulation at 8 C.F.R. § 103.4. The director's decision will be affirmed in part and withdrawn in part. The petition will be denied.

The petitioner was granted conditional lawful permanent residency as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5). The petitioner claimed eligibility based on an investment in a regional center pursuant to section 610 of the Judiciary Appropriations Act, 1993, Pub. L. 102-395 (1993) as amended by section 116 of Pub. L. No. 105-119, 111 Stat. 2440 (1997); section 402 of Pub. L. No. 106-396, 114 Stat. 1637 (2000) and section 11037 of Pub. L. No. 107-273, 116 Stat. 1758 (2002). The regional center is South Dakota International Business Institute (SDIBI), Dairy Economic Development Region (DEDR). U.S. Citizenship and Immigration Services (USCIS) designated SDIBI/DEDR as a regional center on April 8, 2004. The petitioner invested in the regional center through the [redacted] The petitioner now seeks to remove conditions on lawful permanent resident status pursuant to section 216A of the Act, 8 U.S.C. § 1186b.

The director determined that the 2.66 multiplier was not appropriate, that the petitioner could not include Mr. and Mrs. [redacted] as direct employees and that an attempt to verify the information on the Forms I-9 submitted revealed that several of the direct employees had not submitted legitimate documentation to establish that they are qualifying. The director denied the petition and certified the matter to the AAO. There is no appeal available for a denied Form I-829. The regulation at 8 C.F.R. § 103.4(a)(5), however, allows the director to certify any decision to this office whether or not the case is appealable. The petitioner has submitted a brief on certification.

The two statutory requirements at section 203(b)(5) of the Act are exceedingly simple, mandating the provision of a visa to any investor who: (1) makes an investment of the requisite capital, and (2) creates jobs for at least 10 "U.S. citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States" other than the investor or the investor's spouse, sons or daughters. In this case, the petitioner has made the requisite investment, albeit into an enterprise that failed after the petitioner filed the Form I-829. However, the investor appears never to have employed the requisite number of qualifying workers. On that basis alone, the petition may not be approved.

The heart of the petitioner's request is that USCIS should remove conditions on his lawful permanent resident status on the basis of a failed enterprise with a workforce that is staffed almost entirely with aliens who are not "lawfully authorized to be employed in the United States." 8 C.F.R. § 204.6(e). According to the AAO's review, approximately 82 percent of the petitioner's workforce are not employment authorized. While the failure of the enterprise does not necessarily prohibit removal of conditions on the petitioner's lawful permanent resident status, USCIS is precluded by statute and regulation from removing conditions if the enterprise failed to create the requisite number of jobs for

[1] South Dakota public records list the status of the general partner of [redacted], LLC, as "delinquent." *See* [redacted] (accessed January 13, 2011 and incorporated into the record of proceeding.)

qualifying employees (*i.e.*, U.S. citizens, lawful permanent residents, or other immigrants lawfully authorized to be employed in the United States).

For the reasons discussed below, the AAO will uphold the director's determination regarding who may be considered direct and qualifying employees of the new commercial enterprise. USCIS is statutorily precluded from approving the petition in this case because the petitioner has failed to employ the requisite number of qualifying employees during the conditional period or within a reasonable time thereafter. The AAO will withdraw the director's concerns regarding the use of multipliers that were disclosed in support of the approved Form I-526 petition. Nevertheless, the AAO concurs that allowing the application of a multiplier to non-qualifying jobs would likely produce an outcome that is inconsistent with Congressional intent. Finally, the AAO will make a separate finding of willful material misrepresentation because the petitioner submitted: (1) unsupported Internal Revenue Service (IRS) Forms W-2 that are contradicted by other IRS tax reports as evidence for two of the claimed qualifying direct employees, and (2) Forms I-9 and payroll records from an unrelated entity, [redacted] as evidence of his own investment enterprise's compliance with section 203(b)(5)(A)(ii) of the Act.

The AAO maintains plenary power to review cases on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). Moreover, this matter was certified to the AAO pursuant to 8 C.F.R. § 103.4 for review of all of the unusually complex or novel issues.

I. The Law

Section 203(b)(5)(A) of the Act, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
>
> (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

Section 216A(a)(1) of the Act provides:

> Conditional basis for status.-Notwithstanding any other provision of this Act, an alien entrepreneur (as defined in subsection (f)(1)), alien spouse, and alien child (as defined in subsection (f)(2)) shall be considered, at the time of obtaining the status of an alien

> lawfully admitted for permanent residence, to have obtained such status on a conditional basis subject to the provisions of this section.

Section 216A(c)(1)(A) of the Act provides that the alien entrepreneur must submit a petition which requests the removal of such conditional basis. Section 216A(d)(1) of the Act provides that each petition shall contain facts and information demonstrating that the alien invested or is actively in the process of investing the requisite capital, that the alien sustained the investment actions throughout the conditional residence period, and that the alien is otherwise conforming to the requirements of section 203(b)(5) of the Act. Section 216A(c)(3)(A) of the Act requires USCIS to make a determination "as to whether the facts and information described in [section 216A(d)(1) of the Act] and alleged in the petition are true." Section 216A(c)(3)(B) requires USCIS to remove conditions on the alien entrepreneur's status if it determines that the facts and information are true. Conversely, section 216A(c)(3)(C) of the Act requires USCIS to terminate the alien entrepreneur's status if it determines that the facts and information are not true.

The regulation at 8 C.F.R. § 216.6(a)(4) states that a petition for removal of conditions must be accompanied by the following evidence:

> (i) Evidence that a commercial enterprise was established by the alien. Such evidence may include, but is not limited to, Federal income tax returns;
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> (ii) Evidence that the alien invested or was actively in the process of investing the requisite capital. Such evidence may include, but is not limited to, an audited financial statement or other probative evidence; and
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> (iii) Evidence that the alien sustained the actions described in paragraph (a)(4)(i) and (a)(4)(ii) of this section throughout the period of the alien's residence in the United States. The alien will be considered to have sustained the actions required for removal of conditions if he or she has, in good faith, substantially met the capital investment requirement of the statute and continuously maintained his or her capital investment over the two years of conditional residence. Such evidence may include, but is not limited to, bank statements, invoices, receipts, contracts, business licenses, Federal or State income tax returns, and Federal or State quarterly tax statements.
>
> (iv) Evidence that the alien created or can be expected to create within a reasonable time ten full-time jobs for qualifying employees. In the case of a "troubled business" as defined in 8 CFR 204.6(j)(4)(ii), the alien entrepreneur must submit evidence that the commercial enterprise maintained the number of existing employees at no less than the pre-investment level for the period following his or her admission as a conditional permanent resident. Such evidence may include payroll records, relevant tax documents, and Forms I-9.

The regulation at 8 C.F.R. § 204.6(e) states, in pertinent part:

> *Employee* means an individual who provides services or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise. In the case of the Immigrant Investor Pilot Program, "employee" also means an individual who provides services or labor in a job which has been created indirectly through investment in the new commercial enterprise. This definition shall not include independent contractors.
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> * * *
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> *Qualifying employee* means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

Employees that meet the definition of "employee" quoted above constitute the "direct employees" of the new commercial enterprise. As the petitioner invested in a regional center, the petitioner may also rely on "indirect" job creation extrapolated through the use of reasonable methodologies. 8 C.F.R. § 204.6(j)(4)(iii). Where the petitioner relies on direct job creation, however, even if within a regional center, the petitioner must demonstrate that those direct employees are also "qualifying employees" as defined above.

II. The Procedural History

On September 9, 2005, the petitioner filed a Form I-526 petition [redacted] based on his investment in [redacted], a partnership formed to invest in [redacted] The petitioner asserted that the new commercial enterprise would invest in a dairy farm.

The petitioner indicated that the investment was in a rural area. Thus, the minimum investment amount is $500,000. Counsel's initial cover letter explained that [redacted], an experienced dairy farmer from [redacted] the general partner of [redacted] for the purpose of starting a dairy farm in South Dakota. On page 12 of counsel's cover letter, counsel stated that the multiplier for calculating indirect jobs would be 2.66. Counsel projected that the dairy would create 16 direct jobs, resulting in "total job creation" of 42.56 using the 2.66 multiplier. The director approved the petition without any further inquiry. The petitioner submitted an IRS Form SS-4, Application for Employer Identification Number (EIN) listing the EIN for [redacted]

On June 2, 2008, the petitioner filed the Form I-829 at issue in this proceeding. Counsel asserted that the dairy created 16 direct jobs and, by using the 2.66 multiplier, 42.56 indirect jobs. Counsel

then added the direct and indirect jobs to conclude that the dairy created 58.56 jobs total. The petitioner claimed that Mr. [redacted] and his wife are two of the 16 direct employees.

The petitioner initially submitted the following documentation relating to [redacted] employees:

- Forms I-9, Employment Eligibility Verification, and
- Internal Revenue Service (IRS) Form W-4 Employee's Withholding Allowance Certificates for [redacted] employees.

The petitioner also submitted the following documentation relating to [redacted]

- IRS Form 943, Employer's Annual Federal Tax Return for Agricultural Employers, listing total wages of $463,013.88 in 2007;
- Form 1065, U.S. Return of Partnership Income, showing guaranteed payments to partners of $26,800 and labor costs of $646,393 on Schedule F for 2007;
- A 2007 '[redacted] Form W-3, Transmittal of Wage and Tax Statements, indicating the partnership issued 39 Forms W-2 and listing total wages of $464,392.88; and
- Thirty-nine Forms W-2, none of which are issued to Mr. or Mrs. [redacted]

On February 20, 2009, the director issued a request for additional evidence (RFE). In response to the RFE, the petitioner submitted 27 IRS Forms W-2 for 2008. The petitioner submitted quarterly wage and withholding reports for '[redacted] and '[redacted] Mr. and Mrs. [redacted] are listed as the sole employees of '[redacted] The petitioner also submitted 2007 and 2008 IRS Forms W-2 for Mr. and Mrs. [redacted] The IRS Forms W-2 issued to Mr. and Mrs. Winter bear the name of "[redacted]" and the EIN 56-2528810.

In response to an August 11, 2010 notice of intent to deny (NOID), counsel, consistent with the initial Form I-526 filing, asserts that the creation of 16 direct jobs results in 42.56 "direct and indirect jobs."

On December 6, 2010, the director denied the petition and certified her decision to the AAO. The director determined that the petitioner had not demonstrated that the multipliers used to calculate indirect job creation were appropriate, and that the majority of the direct employees were not "qualifying" as defined at 8 C.F.R. § 204.6(e). In addition, the director determined that the general partner's founder and his wife could not be included among the direct employees created by the petitioner's investment because they are listed as employees of '[redacted] in the quarterly returns rather than as employees of [redacted], the new commercial enterprise.

On certification, counsel submitted a brief and additional evidence.

On February 17, 2011, the AAO advised the petitioner of derogatory evidence. The AAO also advised the petitioner of its intent to make a finding of material misrepresentation.

First, the AAO notified the petitioner that a bank foreclosed on the regional center after June 2, 2008, the filing date of the petition. Second, the AAO advised that the 2007 Form W-2 wages for Mr. and Mrs. [redacted] are not reflected within the 2007 IRS Form W-3 wages that [redacted] reported to the Internal Revenue Service. Third, the AAO noted that the [redacted] IRS Forms W-2 are visibly different from the other Forms W-2 that [redacted] issued in 2007 and 2008. Specifically, the [redacted] IRS Forms W-2 contain a different number code under the year, list the company name as '[redacted]' instead of '[redacted]' and the employer name and address are single spaced rather than double spaced.[2] Finally, the AAO noted that the Forms I-9 the petitioner submitted in response to the director's request for additional evidence and the accompanying quarterly payroll records did not relate to the new commercial enterprise.

The AAO advised that it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Counsel responded to the AAO's notice with a statement and additional evidence. First, counsel asserts that the petitioner sustained his investment for two years and the business' subsequent failure is not a consideration. Counsel further asserts that a letter from the employer's accountant explains the discrepancies between the IRS Form W-3 and the two extra IRS Forms W-2. Counsel acknowledges for the first time that the second set of Forms I-9 and payroll records relate to a different business but asserts, again for the first time, that the petitioner submitted this evidence "to illustrate the possible extension of interpretation of USCIS policy relating to a 'successor-in-interest.'" Finally, it is counsel's position that a good faith effort to comply with Form I-9, Employment Eligibility Verification, paperwork requirements for purposes of section 274A of the Act is sufficient to demonstrate compliance with the statutory job creation requirement at section 203(b)(5)(A)(ii) of the Act and the implementing regulation at 8 C.F.R. § 204.6(e), even where USCIS possesses information that the petitioner has not complied with the statutory and regulatory requirement.

III. Analysis

A. Evidence of the [redacted] as Direct Employees

The 2007 and 2008 IRS Forms W-2 issued to Mr. and Mrs. [redacted] bear the name of '[redacted] L.P." and the [redacted] The [redacted] combined 2007 IRS Form W-2 wages of $26,800 are

[2] The [redacted] Forms W-2 list the number code '[redacted]' under the year while the '[redacted] Forms W-2 for Mr. and Mrs. [redacted] list the number code [redacted] The number code '[redacted] appears in the box under Box 19 on the Form W-3.

not reflected in the 2007 IRS Form W-3 that the petitioner first submitted to USCIS. Instead, the 2007 IRS Form W-3 reflects that the petitioner paid $464,392.88 in wages, tips and other compensation to 39 employees. This figure precisely matches the total wages and compensation listed on the 39 IRS Forms W-2 for 2007 that the petitioner initially provided to USCIS with the Form I-829, none of which are for the [redacted] Finally, the petitioner submitted quarterly wage and withholding reports for "Winter Dairy LLP" and '[redacted]' Mr. and Mrs. [redacted] are listed as the sole employees of '[redacted]'

On certification, counsel notes that [redacted] does not exist and asserts that the use of the abbreviation "LLC" was a typographical error. The petitioner submits a search for '[redacted]' on the website of the Secretary of State of South Dakota. The only result is for '[redacted]'. Counsel also notes that '[redacted]' issued Forms W-2 to Mr. [redacted] and his wife in 2007 and 2008. The Forms W-2 list the new commercial enterprise's EIN.

The petitioner has not explained why Mr. and Mrs. [redacted] names appear on a separate quarterly wage and withholding report from the other employees of [redacted] if they are, in fact, employees of [redacted]. Moreover, the record does not explain why "[redacted]" indicates on its quarterly reports that it operates in other locations while "[redacted]" indicates on its quarterly reports that it does not. Based on these discrepancies, it is not clear that they are, in fact, the same entity.

In response to the AAO's February 17, 2011 notice, the petitioner submits a March 2, 2011 letter from [redacted], the Certified Public Accountant for [redacted]. In its notice, the AAO explained that the instructions to IRS Form W-3 "specific to box 'd' indicate that an employer may issue separate Forms W-3 for different 'establishments' under the same EIN" but that [redacted] IRS Form W-3 does not include an establishment number suggesting that it issued more than one IRS Form W-3 in 2007. In response, Mr. [redacted] asserts that there are no irregularities with respect to the "multiple establishment numbers on [the IRS] Forms W-2," explaining that the differences are a "function of the software not germane to the treatment of the W-2." Given that the AAO referenced the absence of an establishment number on the IRS Form W-3, it is unclear how Mr. [redacted] discussion of "multiple establishment numbers" on the IRS Form W-2 is responsive. Regardless, after reviewing the information from the Secretary of the State of South Dakota, we accept that there is only one establishment, which is [redacted][3]

Mr. [redacted] attests that IRS Forms W-2 are the only appropriate means to document the compensation for Mr. and Mrs. [redacted] because the Winters are not partners of [redacted] Thus, Mr. [redacted] asserts, the "original treatment" of their wages as guaranteed payments on the 2007 IRS Form 1065 was in error. Mr. [redacted] further states that the "transactions originally referenced were prior to discovery of the improper treatment of the [redacted] [sic] compensation as

[3] The AAO observes that the terms LLC, LLP, and LP denote three different types of commercial enterprise: a Limited Liability Corporation, a Limited Liability Partnership, and a Limited Partnership.

guaranteed payments" and that the Form "W-2's were later issued to reflect the proper treatment as employees."

The AAO did not question that any wages paid to Mr. and Mrs. [redacted] should be reflected on an IRS Form W-2 if they are employees. At issue are: (1) discrepancies between the number of IRS Forms W-2 and the wages reflected on the Forms W-2 for 2007 in comparison to the number of employees and total wages listed on the 2007 IRS Form W-3, and (2) the physical differences between the IRS Forms W-2 that [redacted] issued to Mr. and Mrs. [redacted] and the IRS Forms W-2 that it issued to its other employees.

Mr. [redacted] fails to explain why the 2007 IRS Form W-3 does not account for the wages in the 2007 IRS Forms W-2 purportedly issued to the [redacted] Even if [redacted] LP issued the two IRS Forms W-2 after preparing the 2007 IRS Form W-3, Mr. [redacted] does not address whether the enterprise was then required to prepare a new 2007 IRS Form W-3 and, if not, then why not. The petitioner failed to submit any supporting evidence, such as a new IRS Form W-3 or IRS-certified transcripts, showing that it filed an amended 2007 IRS Form W-3 and new IRS Forms W-2 for the [redacted] Mr. [redacted] also fails to explain why the IRS Forms W-2 that [redacted] LP issued to Mr. and Mrs. [redacted] are visibly different from the ones issued to its other employees in 2007 and 2008. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* The petitioner himself does not attempt to explain any of these discrepancies beyond the submission of Mr. [redacted] statement.

Even if [redacted] corrected its mistake for 2007 tax purposes, as implied by Mr. [redacted] that does not explain why it continued listing Mr. and Mrs. [redacted] separately from the other [redacted] employees in late 2008. Specifically, the petitioner submitted quarterly returns for [redacted] and [redacted] The information in the quarterly returns undermines Mr. Boadwine's claim that the petitioner corrected its "improper treatment" of the [redacted] and now issues IRS Forms W-2 because they reflect that '[redacted]' ended 2008 with 18 employees, none of whom are Mr. or Mrs. [redacted] Mr. and Mrs. [redacted] are listed as the only employees for '[redacted]'

Ultimately, like a delayed birth certificate, the extra IRS Forms W-2 for Mr. and Mrs. [redacted] obviously prepared after the preparation of the 2007 IRS Form W-3 and uncorroborated by a new or amended Form W-3, raise serious questions regarding the truth of the facts asserted. *Cf. Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997); *Matter of Ma*, 20 I&N Dec. 394 (BIA 1991) (discussing the evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings). Based on these serious discrepancies and contradictions, the petitioner has not

[4] The 2011 IRS publication "Instructions for Forms W-2 and W-3" at page 12 advises an employer to"[b]e sure that the amounts on Form W-3 are the total amounts from Forms W-2." *See* [redacted]

demonstrated that the [redacted] IRS Forms W-2 for 2007 are valid. Accordingly, the petitioner has not established that Mr. and Mrs. [redacted] are qualifying, direct employees.

B. Evidence of Other Direct Employees

Pursuant to the instructions on the Form I-829, the petitioner submitted Forms I-9 and supporting documentation for 16 of the 22 former and current employees of [redacted] only one of whom is a United States Citizen. In addition, the petitioner submitted what he purports to be the supporting documentation for those forms. On August 11, 2010, the director advised the petitioner that USCIS had attempted to verify the documentation the petitioner submitted for the 15 non-U.S. citizen employees listed on the '[redacted] quarterly return. More specifically, the director named 13 of the employees and advised the petitioner that they "are not authorized to work in the United States."

In response, the petitioner submitted new Forms I-9 for the same employees and some new employees in exhibits 2 and 8. With regard to exhibit 8, counsel stated:

> In addition to the evidence provided in support of the initial I-829 filing and in response to the RFE, we presently are providing additional evidence reflecting the present day sixteen (16) full time positions at the Dairy. (See **Exhibit 8:** which contains records for the first and second quarters of 2010.)

(Emphasis in original.)

Counsel reiterates this description of the documents at exhibit 8 in the "List of Exhibits":

> **Exhibit 8**: Contains copies of the forms I-9, W-4 and identification copies for 16 current employees; Payroll Summary of the Dairy for 1st and 2nd quarters of 2010.

The petitioner, through counsel, asserts eligibility based on a claim of "reasonable and good faith efforts to comply with the established and clear evidentiary requirements . . . under Section 274A of the INA," which includes completion of the Forms I-9 at Exhibit 8.

In this respect, it must be noted that the Forms I-9 at exhibit 8 are blank at section 2 where an employer is required to list its business name and address. Also, Mr. [redacted] signed all of the forms on September 9, 2010, well after the bank foreclosed on [redacted] in 2009. Mr. [redacted] does not appear on the [redacted] organizational chart or quarterly payroll records, and [redacted] Forms W-2 do not include one for Mr. [redacted]

In addition, exhibit 8 includes payroll summaries for Pleasant [redacted] covering early 2010. The inclusion of [redacted] payroll documentation in exhibit 8 suggests that all of the documents in exhibit 8 relate to [redacted] rather than [redacted]

The petitioner did not suggest that there is any relationship between [redacted] and [redacted], the critical enterprise in this matter.[5]

In the February 17, 2011 notice, the AAO advised the petitioner of its intent to make a finding of material misrepresentation, in part because the documentation in exhibit 8 does not relate to [redacted]

In response, counsel asserts for the first time that the documentation relating to [redacted] "was solely intended for USCIS to consider the possible extension of interpretation of USCIS policy relating to a 'successor-in-interest' for immigration purposes." Counsel continues that "although the [redacted] may not have acquired all of the assets, rights, obligations and liabilities of the predecessor entity, [redacted], that this still might be an instance for which a valid successor relationship could possible [sic] be considered to exist." Counsel suggests that the petitioner submitted the unrelated evidence "simply for illustrative purposes only."

Counsel provides no explanation as to why the petitioner initially asserted that the Forms I-9 and payroll records in exhibit 8 are "evidence reflecting the present day sixteen (16) full time positions at the Dairy." The petitioner did not assert any "illustrative" purpose when first submitting the evidence relating to [redacted] or advance any argument regarding it being a successor-in-interest. As the petitioner now admits that the Forms I-9 submitted in response to the NOID relate to [redacted], the AAO notes what appears to be a falsification of information on the Form I-9 for [redacted] Mr. [redacted] signed the [redacted] LLP Form I-9 on September 1, 2006, when he was purportedly an employee at [redacted] and three years before [redacted] even existed.[6]

Based on this last-minute revelation, it is clear that the discrepancies noted in exhibit 8 may not relate to the new commercial enterprise during the two-year conditional period. However, it remains that the petitioner submitted this documentation in support of the petition, has recently asserted that the evidence may still establish his eligibility because of a "possible" successor-in-interest claim, and that the documentation contains discrepancies. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

The petitioner submits a USCIS memorandum signed by [redacted] entitled *Successor-in-Interest Determinations in Adjudication of Form I-140 Petitions; Adjudicators Field Manual (AFM) Update to Chapter 22.2(b)(5),* AD09-37 (August 6, 2009). This memorandum provides guidance on making successor-in-interest determinations in the adjudication of a Form I-140 Immigrant Petition

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[5] South Dakota records reflect that [redacted] is a separate entity formed on November 18, 2009. *See* [redacted] accessed January 13, 2011 and incorporated into the record of proceeding.

[6] Mr. [redacted] LLP co-signed the Form I-9 on September 9, 2010. The petitioner claims on certification that this Form I-9 is evidence that [redacted] is a current employee of [redacted] however, [redacted] was incorporated in South Dakota on November 18, 2009, three years after Mr. [redacted] allegedly signed the Form I-9. In addition, the petitioner has claimed that Mr. [redacted] was employed at [redacted] through at least 2008.

for Alien Worker. DOL expressly delegated this authority to the legacy Immigration and Naturalization Service (INS) (now USCIS). Counsel asserts that section 203(b)(5) of the Act is also an employment-based visa classification; thus, USCIS should extend the reasoning to the employment creation program set forth in that provision.

The AAO is not persuaded that this analysis has any relevance to petitioner's investment and employment creation requirements set forth at section 203(b)(5) of the Act. The successor-in-interest analysis involves consideration of the continuity of the job offer mandated for specific classifications under sections 203(b)(2) and (3) of the Act, not section 203(b)(5) of the Act. Regardless, as the petitioner has not established that [redacted] is a successor entity, and as the relevant period is the two-year period after the petitioner became a conditional permanent resident, the AAO need not reach whether the petitioner can rely on employment at a successor business.

The petitioner submits a March 3, 2011 letter from Mr. [redacted] asserting that [redacted] purchased the [redacted], buildings, equipments, dairy herd, and other tangible assets" of [redacted] on January 22, 2010 "from The First National Bank in Sioux Falls, South Dakota after the bank had taken possession of the properties . . . in October of 2009." Since The First National Bank in Sioux Falls owned everything that [redacted] purchased in January of 2010, [redacted] is not a successor-in-interest to [redacted] Merely purchasing the foreclosed assets of a defunct business from a bank does not lead to a successor-in-interest relationship.

Counsel has repeatedly asserted that by verifying the documentation supporting the Forms I-9, the director is applying a clear and convincing burden of proof rather than the preponderance of the evidence standard appropriate to immigrant petitions. Counsel further asserts that an employer may not request any documents beyond those allowable for Form I-9 purposes without violating employment discrimination provisions of the Act. Significantly, it is counsel's position that compliance with Form I-9 paperwork requirements for purposes of section 274A of the Act is sufficient to demonstrate compliance with the statutory job creation requirement at section 203(b)(5)(A)(ii) of the Act and the implementing regulation at 8 C.F.R. § 204.6(e), even where USCIS possesses information that the petitioner has not complied with the statutory and regulatory requirements. Finally, counsel notes that an EB-5 investor is not required to use E-Verify and that even if the petitioner decided to use E-Verify at this point, an employer may only use E-Verify to check new hires, not current employees.

Employment verification, governed by section 274A of the Act, and the alien entrepreneur visa classification, governed by section 203(b)(5) of the Act, are two distinct programs with different statutory and regulatory guidelines. The statute at section 203(b)(5) of the Act specifically requires the petitioning alien to create full-time employment for a minimum of 10 U.S. citizens, lawful permanent residents, or other immigrants lawfully authorized to be employed in the United States.

An employer is subject to civil money penalties under sections 274A(e)(4) and (5) of the Act for *knowingly* hiring employees who lack authorization to work in the United States and for paperwork

violations. This proceeding, however, is not an enforcement proceeding. Regardless of whether [redacted] hired the direct individuals knowing that they lacked authorization to work, it remains that the investment has not created the claimed number of direct jobs for qualifying employees as required by the statute and defined at 8 C.F.R. § 204.6(e).

Section 216A(c)(3)(A) of the Act requires USCIS to make a determination "as to whether the facts and information described in [section 216A(d)(1) of the Act] and alleged in the petition are true." In addition, section 216A(c)(3)(B) requires USCIS to remove conditions on the alien entrepreneur's status if the agency determines that the facts and information are true. Conversely, section 216A(c)(3)(C) of the Act requires USCIS to terminate the alien entrepreneur's status if the agency determines that the facts and information are not true.

According to *Matter of Chawathe,* 25 I&N Dec. 369, 376 (AAO 2010), even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the petitioner has satisfied the standard of proof. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, however, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition. *Matter of Chawathe,* 25 I&N Dec. at 375. Moreover, the regulation at 8 C.F.R. § 216.6(c)(2) states that if derogatory evidence exists as to any of the eligibility issues, the director must offer the petitioner an opportunity to overcome such derogatory evidence and, if the petitioner does not overcome that derogatory information, deny the petition.

If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Further, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

Clearly, the statutory provisions governing this classification require USCIS to make a factual determination about the veracity of the information and evidence that a petitioner submits. Nothing in the regulation at 8 C.F.R. § 216.6 suggests that USCIS is precluded from attempting to verify the employment authorization documentation submitted in support of a Form I-829. Significantly, the instructions to the Form I-829, under Compliance Review and Monitoring, state that by signing the Form I-829, the petitioner consents to USCIS verification of the information provided in support of eligibility. That section further states:

> The Department of Homeland Security has the right to verify any information you submit to establish eligibility for the immigration benefit you are seeking at any time. Our legal right to verify this information is in 8 U.S.C. 1103, 1155, 1184, and 8 CFR parts 103, 204, 205, and 214. To ensure compliance with applicable laws and authorities, USCIS may verify information before or after your case has been decided.

Finally, the conclusion that USCIS may verify that the investment has created jobs for qualifying employees is consistent with congressional intent. The title of the visa classification is "Employment creation," suggesting that employment creation is the primary basis for the classification. Section 203(b)(5)(A)(ii) of the Act explicitly states that the investment must create full-time employment for not fewer than "10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States."

The legislative history confirms this intent. Senator Edward Kennedy stated that investors under this program would create "a minimum of 10 new jobs for Americans." 136 Cong. Rec. S17106-01, 17107, 1990 WL 165401 (Oct. 26, 1990). Senator Paul Simon similarly stated that the program would create "new jobs for Americans." *Id.* at 17112. Thus, congressional intent was not merely the creation of jobs in the United States but more specifically jobs for qualifying employees as defined at 8 C.F.R. § 204.6(e). The statutory provisions at section 216A(c)(3) of the Act require USCIS to make a determination as to whether the facts and information alleged in the petition are true.

Whether or not a petitioner is Form I-9 compliant for purposes of section 274A of the Act is unrelated to USCIS's own obligations under section 216A of the Act, and we cannot read section 274A of the Act in such a way that section 216A of the Act would be redundant. To construe section 274A of the Act in that manner would violate the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Dept. of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 340 (1994).

The director's finding that the individuals listed on the supporting Forms I-9 are not employment-authorized, and therefore are not qualifying, must be considered derogatory evidence under 8 C.F.R. § 216.6(c)(2). The director advised the petitioner of this derogatory information and afforded the petitioner an opportunity to respond. The petitioner has not overcome this derogatory evidence by establishing that it replaced the non-qualifying employees with qualifying employees. Instead, counsel contests USCIS' authority to verify the information on the documents and provides new Forms I-9 and IRS Forms W-4, many of which are for the employees of an unrelated dairy. As stated above, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

In light of the above, the AAO upholds the director's conclusion that the majority of the direct employees are not qualifying as required by statute and defined at 8 C.F.R. § 204.6(e). Of all the Forms I-9 submitted, USCIS can verify the supporting documentation for only two of the non-U.S. citizens, one of whom is Mrs. [redacted] however, the petitioner has failed to establish that Mr. and Mrs. [redacted] were actually employed at the enterprise. Thus, the petitioner has not submitted evidence that the investment has created direct jobs for more than one qualifying employee as defined at 8 C.F.R. § 204.6(e) for the purpose of removal of conditions. This conclusion is wholly consistent with the legislative intent to create jobs for qualifying employees.

C. The Multiplier

The regulation at 8 C.F.R. § 204.6(m)(3)(v) provides that a regional center proposal must be supported by "economically or statistically valid forecasting tools, including, but not limited to, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and/or multiplier tables."[7]

As stated above, in support of the original Form I-526, counsel asserted that the petitioner would use a 2.66 multiplier to calculate total job creation. The director approved the petition without further inquiry, apparently considering the economic formula to be a "reasonable methodology" as discussed at 8 C.F.R. §§ 204.6(j)(4)(iii) and (m)(3)(v). In the matter before us, the director now questions whether the multiplier is appropriate for the dairy's location.

The Ninth Circuit, in *Chang v. United States of America,* 327 F. 3d 911 (9th Cir. 2003), held that, during the adjudication of a Form I-829, USCIS could not review whether the initial plan submitted with the Form I-526 was qualifying, only whether the alien sustained that plan. Specifically, the court stated that the Form I-526 approval may not be "decoupled from [Form] I-829 approval." *Id.* The court further stated that Form I-829 approval is predicted by Form I-526 approval and "successful execution of the approved plan." *Id.* As noted by the court in *Chang,* 327 F. 3d at 927, far more evidence is required in support of the Form I-526 petition. In fact, as stated above, the regulation at 8 C.F.R. § 204.6(j)(4)(iii) expressly requires the submission of reasonable methodologies for determining indirect job creation at the Form I-526 stage. At the Form I-829 stage, the petitioner is not required to submit such evidence, although the petitioner must use the methodologies approved at the Form I-526 stage to demonstrate that his investment has created the requisite employment.

Under the reasoning of *Chang*, the director erred in revisiting the appropriateness of the multiplier. The director approved the Form I-526, which disclosed that the petitioner would be using the 2.66 multiplier for the location of the dairy. The petitioner did not materially change the location of the proposed employment creation and the director does not identify information that was misrepresented or not disclosed at the Form I-526 stage that would warrant a new evaluation of the multipliers used. Thus, the petitioner should be able to rely on the 2.66 multiplier as an acceptable means of demonstrating total job creation, including indirect jobs. The AAO withdraws the director's concern that the 2.66 multiplier is not appropriate.

We will discuss below how the multiplier should be applied in this matter given that the majority of the direct jobs are for non-qualifying employees.

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[7] Congress amended the pilot program in 2000 to remove the focus on exports. Section 402 of Pub. L. No. 106-396, 114 Stat. 1637 (2000).

D. Application of the Multiplier to Non-Qualifying Direct Jobs

The final issue that the director certified to the AAO is whether the petitioner may rely on the indirect jobs even though the calculation of indirect jobs applies a multiplier to non-qualifying direct jobs.

We reiterate that Congress intended section 203(b)(5) of the Act as an "employment creation" classification that would create jobs for qualifying employees. The AAO acknowledges that the regional center pilot program allows investors to rely on indirect job creation and USCIS has no means to verify whether indirect employees meet the regulatory definition of "qualifying" at 8 C.F.R. § 204.6(e). Nevertheless, the AAO must address the fact that the petitioner's investment plan called for the creation of qualifying direct jobs and the calculation of indirect jobs by applying a multiplier to those direct jobs.

Upon review, the petitioner has claimed 16 qualifying direct employees, but failed to establish that it employed more than one qualifying direct employee. Instead, the petitioner has submitted unrelated evidence from another dairy in an attempt to persuade USCIS that the new commercial enterprise employed the requisite number of qualifying employees. In addition, the petitioner has submitted Forms W-2 for Mr. and Mrs. [redacted] and a 2007 Form W-3 with unresolved contradictions so serious that the AAO cannot consider the Winters' Forms W-2 to be valid.

The petitioner's evidence regarding its direct qualifying employees is not relevant, probative or credible. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. The submitted evidence in this matter is so flawed, that there is no established number of direct jobs that can be used for the multiplier.

Even if we were to consider the claims in a light most favorable to the petitioner, and apply the 2.66 multiplier to the non-qualifying direct jobs, the resulting number would not satisfy the statutory minimum. The petitioner has not submitted consistent, probative, and credible evidence that Mr. and Mrs. [redacted] worked as direct employees; therefore, the petitioner has only established 14 direct jobs. Applying the multiplier to 14 direct jobs results in 37.24 jobs. As the multiplier represents total job creation (direct and indirect), we must subtract the 13 direct jobs filled by non-qualifying employees for a total of 24.24 jobs. As noted by the director, two alien investors already removed conditions based on these indirect jobs; therefore, we must subtract the 20 jobs that have been allocated to them. Thus, we could not allocate more than four of the indirect jobs to the petitioner. *See* 8 C.F.R. § 204.6(g)(2).

With respect to the other two alien investors who have removed conditions, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if the service center director had approved Form I-829 petitions for two other investors, the AAO would not be bound to follow the contradictory decision of a service center. *See Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Finally, there are serious legal concerns about allowing an enterprise to calculate indirect job creation based on the actual employment of unauthorized aliens. In the certified decision, the director stated that "allowing this practice may be contrary to the spirit of the law as the statute is designed to encourage job creation for qualifying employees." The AAO concurs that allowing the application of a multiplier to non-qualifying jobs would likely result in eligibility for petitioning aliens who are unable to document the creation of any jobs for qualifying employees. This outcome is inconsistent with Congressional intent to create jobs for qualifying employees. *See* 136 Cong. Rec. S17106-01, 17107, 1990 WL 165401.

E. Material Misrepresentation

Beyond upholding the director's decision to deny the application, the AAO is making a formal finding of willful misrepresentation of a material fact that is relevant to future applications for admission. The petitioner signed the Form I-829 under penalty of perjury and attested that he is solely responsible for submission of evidence with this petition. A finding that the facts and information presented at the removal of conditions stage are not true warrants a termination of the petitioner's lawful permanent resident status. Section 216A(c)(3) of the Act, 8 U.S.C. § 1186b(c)(3). Termination of conditional permanent resident status renders the petitioner a deportable alien. Section 237(a)(1)(D) of the Act, 8 U.S.C. § 1227(a)(1)(D).

Section 212(a)(6)(C) of the Act provides:

> Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The petitioner submitted 2007 IRS Forms W-2 for [redacted] with salaries that not corroborated by the corresponding IRS Form W-3 for 2007. In the notice dated February 17, 2011, the AAO gave the petitioner the opportunity to rebut and resolve these inconsistencies. The petitioner has failed to do so. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. at 591-92. Based on the unresolved contradictions, the petitioner has failed to establish that the Winters' Forms W-2 are valid.

In addition, the petitioner submitted Forms I-9 and payroll records from [redacted] and claimed that those documents are evidence that [redacted] is employing 16 qualifying employees. The petitioner failed to acknowledge that the documents pertain to an unrelated business until the AAO raised the misrepresentation in a February 17, 2011 notice of derogatory information. The petitioner's response, through counsel, to the notice, *i.e.*, that he submitted the unrelated Forms I-9 and payroll records for "illustrative purposes," strains credulity and is wholly inadequate to the serious nature of the concerns and findings documented in the AAO's notice.

Significantly, the petitioner did not timely retract his claim prior to exposure by the AAO's February 17, 2011 notice. A timely retraction of a misrepresentation can serve as a defense to inadmissibility under section 212(a)(6)(C)(i) of the Act. *See Matter of R-R-*, 3 I&N Dec. 823 (BIA 1949); *Matter of M-*, 9 I&N Dec. 118 (BIA 1960). For the retraction to be effective, however, it must be done "voluntarily and without prior exposure of [the] false testimony." *Matter of R-R-*, 3 I&N Dec. at 827; *see also Matter of Namio*, 14 I&N Dec. 412, 414 (BIA 1973) (holding that recantation of false testimony one year after the event, and only after it became apparent that the disclosure of the falsity of the statements was imminent, was not voluntary or timely). *See also Valadez-Munoz v. Holder*, 623 F.3d 1304, 1309-10 (9th Cir. 2010) (affirming that the doctrine of timely recantation is not available if a person recants only when confronted with evidence of his prevarication).

In general, a few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). However, if a petition includes serious errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after an officer provides an opportunity to rebut or explain, then the inconsistencies will lead USCIS to conclude that the facts stated in the petition are not true. *See Matter of Ho*, 19 I&N Dec. at 591.

As outlined by the Board of Immigration Appeals (BIA), a material misrepresentation requires that the alien willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Tijam*, 22 I&N Dec. 408, 425 (BIA 1998); *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, he or she must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); Matter *of Kai Hing Hui*, 15 I&N Dec. at 288.

First, the petitioner submitted 2007 IRS Forms W-2 for the [redacted] and Forms I-9 and payroll records relating to [redacted] to USCIS, in support of a visa petition, which contained information that is patently false. A misrepresentation can be made to a government official in an oral interview, on the face of a written application or petition, or by submitting evidence containing false information. INS Genco Op. No. 91-39, 1991 WL 1185150 (April 30, 1991). Here, the submission of invalid IRS Forms W-2, and Forms I-9 and payroll records that the petitioner falsely presented as belonging to [redacted] in support of the Form I-829 petition constitutes a false representation to a government official.

Second, the AAO finds that the petitioner willfully made the misrepresentation. The petitioner signed the Form I-829 petition, certifying under penalty of perjury that the petition and the submitted evidence are all true and correct. *See* section 287(b) of the Act, 8 U.S.C. § 1357(b); *see also* 8 C.F.R. § 103.2(a)(2). More specifically, the signature portion of the Form I-829, at part 6, requires the petitioner to make the following affirmation: "I certify, under penalty of perjury under the laws of the United States of America, that this petition and the evidence submitted with it is all true and correct." On the basis of this affirmation, made under penalty of perjury, the AAO finds that the petitioner willfully and knowingly made the misrepresentation.

Third, the evidence is material to the petitioner's eligibility. To be considered material, a false statement must be shown to have been predictably capable of affecting the decision of the decision-making body. *Kungys v. U.S.*, 485 U.S. 759 (1988). In the context of a visa petition, a misrepresented fact is material if the misrepresentation cut off a line of inquiry which is relevant to the eligibility criteria and that inquiry might well have resulted in the denial of the visa petition. *See Matter of Ng*, 17 I&N Dec. at 537.

The misrepresentation cut off a potential line of inquiry regarding the petitioner's claim to have employed 16 qualifying direct employees. The employment of qualifying direct employees is directly material to the petitioner's eligibility under the statutory provisions at section 203(b)(5)(A)(ii) of the Act, and the regulation at 8 C.F.R. § 204.6(e). As the evidence of the Winters' employment is not valid, and as the Forms I-9 and payroll records for [redacted] are unrelated to the new commercial enterprise, the director would have likely terminated the petitioner's conditional resident status based on the true facts. The AAO concludes that the petitioner's misrepresentations were material to its eligibility.

By filing the instant petition and submitting evidence purporting to document the employment of qualifying employees, the petitioner has sought to procure a benefit provided under the Act using documents that are not what they were originally purported to be. Because the petitioner has failed to provide independent and objective evidence to overcome, fully and persuasively, our finding that the petitioner misrepresented the nature of these documents, the AAO finds that the petitioner has willfully misrepresented a material fact. This finding of willful, material misrepresentation shall be considered in any future proceeding where admissibility is an issue.

IV. Conclusion

The petitioner has established, under the reasoning of *Chang*, the appropriateness of the previously approved 2.66 multiplier. The petitioner has failed to establish that [redacted] employed the requisite number of qualifying direct employees. The petitioner has failed to establish that it may apply the multiplier to non-qualifying direct jobs in order to create indirect jobs. Finally, the petitioner has willfully misrepresented evidence in an effort to mislead USCIS and the AAO on an element material to his eligibility for a benefit sought under the immigration laws of the United States.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the decision of the director denying the petition will be affirmed.

ORDER: The director's decision of December 6, 2010 is affirmed. The petition is denied with a separate finding of willful misrepresentation of a material fact on the part of the petitioner, [redacted]

FURTHER ORDER: The AAO finds that the petitioner, [redacted] willfully misrepresented evidence that he submitted in an effort to mislead USCIS and the AAO on an element material to his eligibility for a benefit sought under the immigration laws of the United States.